IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	S049973
Plaintiff and Respondent,	)	Los Angeles County Superior Court No. LA015339
v.	)	
DOUGLAS OLIVER KELLY,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply, appellant addresses specific contentions by respondent, but does not reply to arguments adequately addressed in his opening brief. The failure to address any particular argument, sub-argument, or allegation by respondent or to reassert any particular point made in the opening brief does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

I

THE TRIAL COURT EXCUSED FOR CAUSE A PROSPECTIVE JUROR BASED ON AN INADEQUATE VOIR DIRE EXAMINATION AND AN ERRONEOUS DETERMINATION THAT THE JUROR COULD NOT VOTE FOR THE DEATH PENALTY; AUTOMATIC REVERSAL OF THE DEATH PENALTY IS REQUIRED

Respondent's argument that the dismissal of prospective juror James T.[1] was justified because his ability to consider the death penalty was substantially impaired is based on a gross mischaracterization of the record and a fundamental misunderstanding of the law regarding the death-qualification of prospective jurors in a capital case.[2] Respondent's argument parrots the distorted standard for death-qualification made by the prosecutor at trial by repeatedly and erroneously equating moral opposition to the death penalty with substantial impairment. (See e.g., RB 52, 55, 56.)

Respondent argues: "While prospective juror James T. initially told the prosecutor during voir dire that he could follow the law and weigh aggravating and mitigating factors (RT 618), he later admitted that, even in a situation where there were 'a lot of aggravating factors' and *no* mitigating factors, he could not support the death penalty because he would have

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[1] Because this case predates Code of Civ. Proc. §237 and the jurors discussed in the brief were not seated jurors, the case is not covered by the statute. Nevertheless, in an abundance of caution, appellant will not use the prospective jurors' last names in this brief.

[2] Respondent's opening assertion that appellant has waived any issue "not squarely grounded in *Wainwright v. Witt* (1985) 469 U.S. 412" (RB 44) is puzzling because the cases cited by respondent do not address issues related to *Witt*, and appellant raised no other issues in this argument.

trouble abandoning his moral opposition to it (RT 620)." (RB 57, emphasis in original.) Respondent misrepresents the record to make this claim.

In response to the prosecutor's question as to how James T. thought he would resolve "the struggle of what you feel your morality is and what the state law is," James T. stated his belief that, in order to be an effective juror, one had to put aside one's ambivalence about the death penalty and follow the law. (RT 585.) Instead of asking James T. to explain his answer, i.e., whether *he* was able to do what he believed was necessary to be an "effective" juror, the prosecutor offered his own interpretation of James T.'s answer. He began: "You are saying that you don't think you would have a problem doing something that you think – ." When he realized that what he was saying was not helpful to his position, the prosecutor switched gears and stated, "I have trouble with the idea that you would abandon your own morality." (RT 620.)

The prosecutor's statements raise two issues. First, no juror is required to "*abandon* [his or her] own morality" in order to sit on a capital jury. Even those jurors who, like James T., "firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to *temporarily set aside their own beliefs in deference to the rule of law*." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, emphasis added; *People v. Stewart* (2004) 33 Cal.4th 425, 446.) Second, if, as the prosecutor's own initial interpretation of Mr. T.'s answer suggests, the prospective juror's position was arguably unclear, it was the prosecutor's burden to prove to the trial court that the standard of impairment was satisfied as to prospective juror James T. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.)

Prospective juror James T. was precisely the type of juror whose exclusion is prohibited under the decisions of the United States Supreme Court and this Court – a juror who may harbor concerns, and even oppose the death penalty, but is willing to consider it as a punishment. The improper removal of jurors like James T. from capital juries leads to the composition of juries more prone to vote for a death sentence.

As this Court observed in *People v. Stewart*, *supra*, 33 Cal.4th at p. 446,

> In light of the gravity of that punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. As explained below, however, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled – indeed, duty-bound – to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror.

Respondent asserts that because James T. "gave equivocal and conflicting answers about his ability to impose the death penalty," the trial court's determination that he was substantially impaired must be afforded deference. (RB 53.) In order to make this claim, respondent flatly misstates the record. Respondent asserts: "[E]ven in the 'very heinous type of situations,' [James T.] acknowledged that he was 'waffling' with respect to the death penalty." (RB 55.) In fact, James T. said just the opposite: he was generally opposed to the death penalty, but he "waffled" in his *opposition* in "heinous" cases. (RT 586.)

Respondent also incorrectly argues that James T. "made statements that he could not, in good conscience, impose the death penalty." (RB 55.) On the contrary, while prospective juror James T. was honest and straightforward about his moral opposition to the death penalty, he was also

emphatic that he *could* impose such a penalty. He stated, "I'm basically against the death penalty but – " As James T. was attempting to explain his position, he was interrupted by the court's question: "Could you see a situation where you could impose it?" to which James T. responded, "Yes. Oh, yes." (RT 586.)

These sentiments are markedly different from those expressed by the prospective jurors in the cases cited by respondent. (RB 53-55.) The prospective juror in *People v. Harrison* (2005) 35 Cal.4th 208, said several times that she could *not* vote for the death penalty. In addition, in *Harrison* the trial court noted for the record that the juror was "quite uncomfortable" during questioning and physically manifested her anxiety in a manner that might not be reflected on the record. (*People v. Harrison, supra,* 35 Cal.4th at p. 227.) Based on these factors, this Court concluded that the trial court dismissed the juror not because she harbored doubts about the death penalty, but because the court determined that those doubts would substantially impair her ability to follow the court's instructions. The same cannot be said about James T.

Similarly, the prospective jurors in *People v. Griffin* (2004) 33 Cal.4th 536, gave answers that were fundamentally different from James T.'s. One prospective juror in *Griffin* said she did not know if she could *ever* vote to impose the death penalty, regardless of the evidence presented in a given case. (*Id*. at p. 560.) Another prospective juror stated that she did not know if she could vote for the death penalty, even in a case in which she believed the defendant deserved the death penalty. (*Id*. at p. 561.) James T. was clear that he could impose the death penalty. He said he leaned "a little bit more" towards not imposing the death penalty, but in "some cases, like Oklahoma or anything like that, I'd just as soon go out

and do the job myself." (RT 606.) In response to a question about the purpose of the death penalty, Mr. T. wrote: "To get an incorrigable [sic] criminal that committed a very heinous series of crimes away from society permanently." (Supp. CT II 288.) This was certainly the description of appellant offered by the prosecutor at trial. On his questionnaire, James T. wrote that he felt that "some segments get death too often, and other segments not enough." (Supp. CT II 289.) He was adamant that "the case determines [my] mind," and that he did not want to be put in a "general category but want[ed] to look at each individual case to make the decision." (RT 606.)

These views are nothing like those expressed by the prospective juror in *People v. Cunningham* (2001) 25 Cal.4th 926, 982, cited by respondent (RB 54), who was either unable or unwilling to answer several questions related to his ability to impose the death penalty. Similarly, the prospective juror in *People v. Samayoa* (1997) 15 Cal.4th 795, was initially uncertain about his ability to impose the death penalty, and eventually told the court he was "really nervous" about considering the death penalty and did not believe he could set aside his personal views when considering the death penalty. (*Id*. at p. 823.)

Respondent points to no case – because there is none – in which a juror who gave answers like those given by prospective juror James T. was found to be properly excluded. With the exception of this Court's opinion in *People v. Stewart*, *supra*, 33 Cal.4th 425, discussed above, respondent also fails to address any of the cases cited in the opening brief.

The trial court's conclusion that James T. was "absolutely opposed to the death penalty," is belied by an accurate review of the record and James T.'s erroneous removal from appellant's jury panel requires reversal

of the penalty.

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II

THE ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR CHERYL M. REQUIRES REVERSAL OF THE CONVICTION, SPECIAL CIRCUMSTANCE FINDINGS AND DEATH JUDGMENT

A. The Record Does Not Support a Finding of Either Actual or Implied Bias of Ms. Martin

Prospective juror Cheryl M., an African American woman, was dismissed from the jury panel in response to the prosecutor's challenge for cause. Cheryl M.'s son's uncle, Keith Pleasant, was prosecuted for rape by the trial prosecutor, Mr. Ipsen, who, despite Cheryl M.'s unequivocal statements denying any relationship with Pleasant, or knowledge of his case, insisted that she might be biased against Ipsen. Respondent's defense of the trial court's action is utter conjecture. Nothing said by Ms. M., nor any inference from the circumstances presented on the record, support a finding of either actual or implied bias.

The only justification offered by respondent – "the *same* deputy district attorney had successfully prosecuted her son's uncle for rape, resulting in a long prison sentence. Prospective juror Cheryl M. admitted knowing the uncle [Pleasant] and her son lived in the same residence with her" – is no justification at all, as demonstrated by respondent's failure to cite even one case with analogous facts. (RB 62, emphasis in original.) Every case cited by respondent involved a juror whose *own* relationship with the prosecutor offered a basis for an inference of bias. (*Ibid*.) In this case, of course, there was no evidence that Cheryl M. or her son had *any* relationship whatsoever with Pleasant or that any connection created by Cheryl M.'s son's relation to Pleasant created any bias on Cheryl M.'s part.

Cheryl M. was never asked what her feelings – if any – were about the prosecution of Pleasant, nor was she asked even one question about her ability to be a fair and impartial juror. The prosecutor acknowledged as much when he admitted, "I don't know what her views are [of the prosecution of Keith Pleasant]." (RT 530.)

The lack of any rational basis for inferring bias on the part of Cheryl M. also distinguishes the present case from *People v. Holt* (1997) 15 Cal.4th 619, cited by respondent (RB 62) in which this Court held that the trial court did not abuse its discretion in dismissing for cause a prospective juror who had a lawsuit pending against the district attorney's office that was prosecuting the case. (*Id.* at p. 656.)

Respondent insists that the trial court's determination of Cheryl M.'s suitability as a juror should be accorded great deference because of the court's superior ability to make such an evaluation "when conflicting inferences are raised by a juror's responses." (RB 62.) While respondent's assertion may be an accurate statement of the law, and the cases cited support it, in this case *no* conflicting inferences were raised by Cheryl M.'s answers. All agree she had, at most, a tenuous connection to someone previously prosecuted by the same deputy district attorney. She said nothing to suggest that this would affect her jury service in this case.

Recognizing that Cheryl M.'s dismissal cannot be justified on the basis of anything she said, respondent resorts to cryptic statements about the possibility that Cheryl M. "might" have harbored bias. "The trial judge, who had the opportunity to observe her and thus could judge her credibility 'far better' than this Court on a cold record, could have reasonably *inferred* that prospective juror Cheryl M. *might* harbor ill feelings amounting to bias." (RB 64, emphasis added.) Such rank speculation is neither factually

substantial nor legally permissible. The inability of a juror to serve "must appear in the record as a demonstrable reality." (*People v. Compton* (1971) 6 Cal.3d 55, 60.)

Respondent argues that even though the prosecutor said he took Cheryl M. at her word that she did not know any of the details of Pleasant's case and had not been present in court during the trial, "the prosecutor's remark does not mean that he did not believe she was biased." (RB 63.) There can be no doubt that the prosecutor feared Cheryl M. *might* be biased against him. Appellant does not dispute that the prosecutor wanted to keep Cheryl M. off of his jury, but the way to accomplish that was by the use of a peremptory challenge, not a baseless challenge for cause. The issue is whether the prosecutor was entitled to have Cheryl M. removed from the jury because she was actually or impliedly biased. As demonstrated in the opening brief, and confirmed by respondent's inability to cite evidence or law to support his position, the court's action in discharging Cheryl M. was not justified.

B. Reversal of the Judgment is Mandated

Respondent does not answer, nor even acknowledge, appellant's argument that the refusal to sanction an improper cause dismissal renders a violation of Code Civil Procedure section 229 an error with no consequence. As noted in appellant's opening brief, a defendant who is able to show that a biased juror sat on the jury – the only means cited by this Court for showing error under *People v. Holt*, *supra*, 15 Cal.4th at p. 656 – is already entitled to relief, regardless of a violation of section 229, because his rights to an impartial jury under the state and federal constitutions have been violated. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) Under the decision in *Holt*, however, a defendant who is unable to

make such a showing has *no* remedy for the unlawful removal of a prospective juror. Except for citing *Holt*, respondent offers no reason why the unlawful removal of a prospective juror in a capital case should be an unenforceable violation.[3]

Respondent does not even attempt to answer appellant's argument that the improper dismissal of a juror for cause requires reversal. Instead, respondent claims, "Appellant admits, 'there is no indication that [Cheryl M.'s] exclusion skewed the seated jury in favor of the prosecution.' (AOB 44.)" (RB 65.) Again, respondent has taken a sentence from appellant's brief out of context. The quoted portion of the sentence was part of the argument made by appellant, but not addressed by respondent, that the analysis of prejudice for the improper removal of a prospective juror for cause unrelated to death-qualification is the same as that employed by the United States Supreme Court in the context of death-related cause challenges. (AOB 44-45.)

Respondent asserts that any error in removing Cheryl M. for cause was harmless because the prosecutor would have used a peremptory challenge against her. This argument was addressed by appellant in the opening brief. (AOB 43-44.) Instead of seriously responding to appellant's argument and the authorities cited, however, respondent summarily dismisses them because "[appellant] relies on cases involving the materially different issue of *Witt* error, which is not subject to harmless error analysis."

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[3] Instead, respondent distorts appellant's argument by quoting portions of the opening brief out of context. Respondent claims, "As appellant himself acknowledges (AOB 41), a 'defendant has a right to jurors who are qualified and competent, not to any particular juror.'" (*People v. Holt, supra*, 15 Cal.4th at p. 656.) In fact, appellant acknowledged only that this was the Court's holding in *Holt*, but then asked this Court to reconsider its position. (AOB 401.)

(RB 65.) Appellant's argument is, of course, that the erroneous removal of a prospective juror for reasons unrelated to death qualification is also not amenable to harmless error analysis.

In the absence of any basis for removing Cheryl M. from the jury panel, and any justification for deeming such error harmless, appellant submits this Court should reverse the judgment in its entirety.

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III

THE TRIAL COURT ERRED IN FINDING APPELLANT HAD FAILED TO MAKE A PRIMA FACIE CASE OF DISCRIMINATORY USE OF PEREMPTORY CHALLENGES BY THE PROSECUTOR; THE USE OF A PEREMPTORY CHALLENGE AGAINST AN AFRICAN AMERICAN JUROR VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL

Respondent's argument begins with the puzzling assertion that appellant has waived any federal constitutional challenge to the prosecutor's discriminatory use of peremptory challenges because trial counsel objected only on *Wheeler* grounds. (RB 70.) This Court held in *People v. Yeoman* (2003) 31 Cal.4th 93, that federal issues under *Batson v. Kentucky* (1986) 476 U.S. 79, were preserved by a trial objection under *Wheeler*. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 17.) Respondent first cites cases that predate *Yeoman*, then makes a "contra" citation to *Yeoman*. As this Court recently reiterated in *People v. Gray* (2005) 37 Cal.4th 168, "Although defendant did not specifically cite *Batson* [citation], or the federal equal protection clause as a basis of his motion to quash the venire, these federal issues were properly preserved for appeal." (*Id*. at p. 184, fn. 2, citing *Yeoman*.) Hence, by citing *Wheeler*, appellant did not waive, but preserved his *Batson* claim.

A. The Requirements for a *Prima Facie* Case Were Met

In the opening brief, appellant asserted that trial counsel had made a prima facie case of discrimination and quoted counsel's argument in support of the *Wheeler* motion during which he stated that three black jurors had been called to the box and all three had been excused from the jury

panel for various reasons. (AOB 52.) Respondent takes appellant to task for allegedly making "factually inaccurate representations" in the brief, because in fact *four*, not three, female African American prospective jurors had been called to the jury box at the time of the *Wheeler* motion. (RB 67 & fn. 33, 73-74.) Respondent's indignation is misplaced. The exact number of prospective African American jurors removed from the jury box is not the critical issue - rather it is the fact that all of these prospective jurors were removed before Selina S. was called to the jury box. Moreover, respondent apparently misread the record because the fourth prospective African American juror discussed by respondent had not been seated in the jury box at the time Selina S. was called.

Jury selection in this case was conducted by seating 12 prospective jurors in the box and 6 additional prospective jurors in front of the box to take the place of any persons removed from the 12 in the box. Sandra J., an African American woman, was called as one of the six prospective jurors in front of the box and was not actually seated in the jury box. (RT 663.) Sandra J. was questioned briefly by the court before the proceedings were adjourned for the day. (RT 670.) At that time, trial counsel moved to quash the panel on the grounds that no African American jurors were in the box. (*Ibid*.)

When court resumed two days later, Sandra J. was late, but the parties agreed to keep her seat open. (RT 682.) By the end of the session, counsel had chosen the 12 seated jurors, but Sandra J. had not appeared. The parties again agreed to keep her seat open during selection of the alternates. (RT 698.) Sandra J. and Selina S., the prospective juror whose removal prompted defense counsel's *Wheeler* motion, were both called as prospective alternate jurors. Selina S. was questioned, but Sandra J. had

still not appeared. (RT 700.) During the course of voir dire of the prospective jurors, Sandra J. arrived and was questioned by the court and counsel. (RT 713.)

Trial counsel's statement, repeated by appellant, that Selina S. was the third African American woman *to be seated* in the jury box, was accurate and respondent's scolding is wholly inappropriate.[4]

Respondent has once again distorted a portion of appellant's brief by claiming that appellant argued that trial counsel had made a prima facie case "because 'the first three' African American prospective jurors to make it into the jury box 'had been stricken for one reason or another . . .'." (RB 73, citing AOB 52.) Respondent is apparently referring to the following paragraph from the opening brief, which states: "Under the circumstances of the present case – namely, that so few African American jurors had made it into the jury box, and at the point counsel made his *Wheeler* motion, the first three to do so had been stricken for one reason or another – defense counsel made a sufficient showing to constitute a prima facie case of discrimination." (AOB 52.) In other words, as the opening brief went on to argue, because of the extraordinarily small number of black jurors called to the box, defense counsel was unable to establish a "pattern" of strikes against black jurors.

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[4] Respondent also accuses appellant of misrepresenting the record by asserting in the opening brief that the prosecutor had the second African American woman to reach the box excused by stipulation. (RB 73-74.) Appellant made clear that the juror was excused by mutual agreement of the parties (AOB 52). The point made by trial counsel at trial, and by appellant on appeal, is that through various means, including the challenge for cause to Cheryl M., and the stipulated excusal for cause of Sarah H., the prosecutor was achieving what he wanted: a jury with few or no African American jurors.

Respondent ignores the significance of this fact and argues against a finding of a prima facie case because the prosecutor used only one of his peremptory challenges against an African American prospective juror. (RB 76.) The discriminatory use of a peremptory challenge cannot be shielded from scrutiny simply because the prosecutor was aided in his quest to eliminate African Americans from the jury by the granting of challenges for cause – legitimate and otherwise.

Since appellant's opening brief and respondent's brief were filed, the United States Supreme Court issued its decision in *Johnson v. California* (2005) ___ U.S. ___ [125 S.Ct. 2410]. In *Johnson*, the Court held that "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id*. ___ U.S. at p. ___ [125 S.Ct. at p. 2417].) "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Id*. at p. ___, fn. 4 [125 S.Ct. at p. 2416, fn. 4].) The Supreme Court's decision in *Johnson* rejected this Court's previous requirement that in order to establish a prima facie case of discrimination, an objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias, explaining that, "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Johnson v. California*, *supra*, ___ U.S. at p. ___ [125 S.Ct. at p. 2416].)

The trial court in the present case did not state the standard under which it evaluated the sufficiency of the prima facie case. Under the same circumstances, in the recent case of *People v. Gray* (2005) 37 Cal.4th 168, this Court conducted its own independent review of the record under the

high court's standard. (*Id*. at p. 187.)

Citing the ultimate racial composition of the jury, *Gray* concluded that the defendant had failed to state a prima facie case of discrimination. (*Id*. at pp. 187-188.) In *Gray*, the prosecutor excluded one African American juror from the regular jury, but left another on, and struck one African American from the panel of alternates, but left another on. In the present case, as noted, one African American woman was seated as an alternate juror.

Appellant noted in the opening brief that the birth mother of the victim, Sara Weir, was Native American, and that Ms. Weir's adoptive family was white. (AOB 5, fn. 5.) The interracial aspects of the offense in this case – the brutal murder of a young non-African American woman by an African American man – were highlighted by the testimony of three other young white women about additional sexual assaults by appellant. Respondent disputes appellant's characterization of the majority of the jurors as white (RB 77), but offers no evidence to the contrary. A review of the seated jurors' questionnaires and voir dire answers strongly suggests that nine of the twelve selected jurors were white.

Appellant submits that the record supports a finding of a prima facie case of discrimination because under *Batson* and *Johnson*, this Court may draw an inference that discrimination occurred and that the prosecutor's reasons should be scrutinized.

B. Review of the Prosecutor's Reasons for Excusing Selina S. Reveal Their Pretextual Nature

Because this Court has before it the reasons offered by the prosecutor, it should elect to review the reasons, as it did in *People v. Turner* (1994) 8 Cal.4th 137, 168. Such a review is especially appropriate

in this case because respondent argues that the prosecutor's reasons did not reveal a discriminatory intent.

Respondent asserts that the record supports the prosecutor's reasons for challenging Selina S. as race-neutral, because "substantial evidence supports the prosecutor's view that Selina S. was unfavorable on the penalty issue because she would probably have difficulty voting for death." (RB 81.) Respondent claims Selina S. gave an "equivocal" answer – "probably" – to the prosecutor's question: "Could you balance the decision as the judge orders you to if he says you have to balance factors and if the factors in aggravation substantially outweigh those in mitigation, the verdict is to be death?" (RT 730.) As noted in appellant's opening brief, but not addressed by respondent, the prosecutor's question was legally inaccurate by stating "if the factors in aggravation substantially outweigh those in mitigation, the verdict is to be death." (AOB 61.) Given the pro-death bias of the prosecutor's misstatement of the law, Selina S.'s response – that she would probably vote for death – reflects a pro-death stance.

In his opening brief, appellant argued that comparative analysis was authorized under existing authorities, and that such an analysis in the present case revealed the pretextual nature of the prosecutor's stated reasons for dismissing Selina S. Respondent refuses to address appellant's comparative analysis argument – either as to the propriety of engaging in such an analysis or as to the merits of appellant's claims. (RB 83-84.) Since respondent's brief was filed, however, the United States Supreme Court issued its opinion in *Miller-El v. Dretke* (2005) ___ U.S. ___ [125 S.Ct. 2317], in which the Court engaged in a comparative analysis for the first time on appeal. This Court has acknowledged the action of the Supreme Court in *Miller-El* in the recent case of *People v. Ward* (2005) 36

Cal.4th 186, 203, ["assuming that we must conduct a comparative juror analysis for the first time on appeal (See *Miller-El v. Dretke* (2005) ___ U.S. ___, 125 S.Ct. 2317, 2326, fn. 2, 196 L.Ed.2d ___)"].) In *People v. Gray*, *supra*, 37 Cal.4th 168, this Court also noted that because the trial court in *Miller-El* ruled that the defendant had made a prima facie case of discrimination, scrutiny of the prosecutor's reasons for excusing the African American jurors at the third stage of *Batson* was appropriate. But, because the trial court in *Gray*, as in the present case, refused to find a prima facie case, the question of whether a third-stage *Batson* analysis of the proffered reasons is appropriate was not addressed. (*Id*. at p. 189.) Nevertheless, this Court in *Gray* did conduct a comparative analysis, and appellant submits that such an inquiry is necessary in this case as well. To ignore the prosecutor's stated reasons for the alleged discriminatory strike would result in shielding from scrutiny not only the trial court's initial determination of the sufficiency of the prima facie case, but the underlying propriety of the prosecutor's strike as well.

Here, the prosecutor's reasons cannot withstand scrutiny under a comparative analysis. Respondent argues that Selina S.'s questionnaire answers in response to questions about which is the worse punishment support an inference that Selina S. was "unfavorable on the penalty issue." (RB 80.) Respondent cites the fact that in response to the question which punishment she thought would be worse for a defendant – death or life in prison without the possibility of parole – she made no selection. (RB 80.) In fact, Selina S.'s responses are no different than those of other non-black selected jurors.[5] "If a prosecutor's proffered reason for striking a black

[5] These jurors are: Barbara P., Tim V., Charlene V., Yolanda A., Linda D., Linda De., Beverly B. and Walid Z. Tim V. Tim V. was initially

panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." (*Miller-El v. Dretke*, *supra*, 545 U.S. ___ [125 S.Ct. at p. 2325].)

Three of these jurors – Tim V., Barbara P. and Charlene V. – like Selina S. – made no selection between death and LWOP. In his response, Tim V. stated: "I don't know what might be worse for a defendant. It has to be applied in accordance with the law. If death is considered by law, to be the worst form of penalty and the evidence proofs [sic] application of most severe penalty than [sic] it must be applied. Personal feelings should be minimized. The law must prevail." (Supp. CT 1566.)

Charlene V., who was chosen as an alternate juror and replaced Beverly B. during the guilt phase of trial, also made no selection on her

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selected as an alternate juror but was excused after he notified the court that he used to work with the victim's step-father. (RT 887.) Beverly B. was initially seated as a juror at the guilt phase, but became ill during trial and was replaced by an alternate juror. (RT 2225.) Charlene V. replaced Beverly B. when she became ill during the guilt phase; Yolanda A. was selected as an alternate juror, but was never seated; Linda D., Linda De., Marcario L. and Walid Z. sat as jurors at both phases of trial. Walid Z. identified himself as white. (2 Supp. CT 2293.) The race of Barbara P., Tim V. , Charlene V., Yolanda A., Linda D., Linda De., Marcario L., Donna H., Joel M. and Beverly B. is not specified in the record. However, based on their questionnaire answers regarding their experiences and contacts with African Americans, it appears that none was a member of that ethnic group. (See 2 Supp. CT 3028 [Barbara P.]; Supp. CT 1555 [Tim V.]; 2 Supp. CT 3510 [Charlene V.];2 Supp. CT 3574 [Yolanda A.]; 2 Supp. CT 2484 [Linda D.]; 2 Supp. CT 3478 [Linda De.]; 2 Supp. CT 3220 [Marcario L.]; 2 Supp. CT 2356 [Donna H.]; 2 Supp. CT 3060 [Joel M.]; 2 Supp. CT 2516 [Beverly B.].)

questionnaire between death and LWOP.[6] She wrote, "We are all different. What I think is different than others in that positions [sic]." (2 Supp. CT 3521.)

Barbara P. was selected as a juror, but excused by stipulation before she was sworn because she was starting a new job. (RT 794.) On her questionnaire, she made no selection between death and LWOP, and wrote: "Depends on the person undergoing the punishment." (2 Supp. CT 3039.)

Selina S.'s written comments in response to this question are also cited by respondent as evidence of her anti-death penalty bias. (RB 80-81) She wrote:

> I believe a person who commits and [sic] crime and is found guilty of that crime he or she must live for the rest of his [/] her physical life with the fact that he or she is guilty as such. I believe both are as bad for the defendant. He/she loses freedom either physically and/or bodily.

(Supp CT 1630.)

Again, however, this answer does not differ from that of other, non-black selected jurors, several of whom expressed the opinion that LWOP was a worse punishment than death. "On the face of it, the explanation is reasonable from the State's point of view, but its plausibility is severely undercut by the prosecution's failure to object to other panel members who expressed views much like . . ." Selina S.'s. (*Miller-El v. Dretke, supra*, 545 U.S. ___ [125 S.Ct. at p. 2329].) In her questionnaire, Linda De. indicated that she thought LWOP was the worse punishment. She wrote: "The person knows they have no chance of ever leading a 'normal' life." (2

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[6] Indeed, Charlene V. did not answer Question79, "What is your opinion of the death penalty?" or Question 80, "What is your opinion of life in prison without the possibility of parole?" (2Supp.CT 3518-3519.)

Supp. CT 2495.)[7] Similarly, Linda D. checked LWOP as the worse punishment and wrote, "the remorse a defendant feels and has to live with every day sometimes is hard to handle – the death makes it final." (2 Supp. CT 3489.) Donna H. thought LWOP was the worse punishment and wrote: "Death is final. Prison for some is worse than death." (2 Supp. CT 2367.) Joel M. felt LWOP was the worst punishment and wrote, "Death is quick and easy but life in jail last [sic] a long time." (2 Supp. CT 3071.) Beverly B. thought LWOP was the worse punishment because "under the present system, prisoners have so many chances to appeal their case, that they may never be executed." (2 Supp. CT 2527.) Marcaria L. thought LWOP was the worse punishment and wrote: "I think it might be worse knowing he will never come out of prison, caged like an animal and die in prison." (2 Supp. CT 3231.) Yolanda A. selected LWOP as the worse punishment, but offered no explanation for her answer. (2 Supp. CT 3585.)

In response to the question which punishment he thought was worse, Walid Z. selected LWOP. He wrote:

> Nobody knows what awaits us after death. But being in prison, in a cell the rest of his or her life would have a huge effect on a person. They have nothing to do but sit and think all day. This has to be the worst punishment a person can get unless they don't have a conscience. In that case the death penalty is a possibility.

(2 Supp. CT 2303.) There is no meaningful distinction between this response and Selina S.'s.

When a comparison is made between Selina S. and non-black jurors,

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[7] Seated juror Joyce S. answered the question by checking the LWOP selection, and wrote: *Some* people have a very hard time with the loss of freedom, though *most* would prefer life with the possibility of parole to the death penalty. (2 Supp. CT 3263, emphasis in original.)

the pretextual nature of the prosecutor's strike against her becomes clear. For example, the plausibility of the prosecutor's concern over Selina S.'s views on the death penalty is completely undermined by his acceptance of another prospective alternate whose pro-life views were so extreme that the prosecutor asked trial counsel to stipulate to excuse her for cause. And although defense counsel declined, the trial court suggested that she might be excused for cause based on her anti-death penalty statements. (RT 682-683.)

Respondent also contends that Selina S. could properly be excused based on her prior employment as a behavioral therapist. (RB 81-82.) Respondent asserts that the prosecutor "reasonably believed that she would be more sympathetic to the defense." (RB 81.) While respondent is legally correct that a prospective juror's employment can be a race-neutral reason for exclusion, that reason is not supported by the record in the present case. Respondent claims there is "substantial evidence that [Selina S.] counseled children and helped them while working as a behavioral therapist." (RB 82.) In fact, Selina S.'s answers to the prosecutor's questions demonstrated only that she "worked with" teenagers and "dealt with" people in the juvenile system. (RT 731-732.) Indeed, Selina S.'s answers are noticeably lacking in any description of therapeutic or assistive tasks. The prosecutor's characterization of her work as a social worker (RT 739) does not comport with the record. In addition, as noted in the opening brief, the prosecutor made no attempt to discern Selina S.'s attitudes toward her former job or the youthful wards with whom she worked. He did not ask her why she left the field, or any other questions that would reveal a bias one way or another. The prosecutor's decision not to question the prospective juror in any meaningful fashion about an area he then relied on

as a reason for striking her from the panel renders his challenge highly suspect. (See, e.g., *Ex parte Travis* (Ala. 2000) 776 So.2d 874, 881 ["[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"]. By contrast, in the case cited by respondent, *People v. Young* (2005) 34 Cal.4th 1149, the prosecutor asked the prospective juror – a therapist – pointed questions designed to ascertain whether she would harbor bias against him if he cross-examined defense mental health experts at the penalty phase. The record thus supported the prosecutor's later reliance on the prospective juror's responses to his questions as a non-discriminatory basis for excusing her from the panel. (*Id*. at p. 1174.)

Also, as noted in the opening brief, the prosecutor failed to question a non-African American prospective juror, Connie G., about her current and previous employment. (AOB 64.) The nature of both jobs – mentoring youth and working as the Program Director of San Fernando Valley Interfaith – certainly implicate the same issues that purportedly concerned the prosecutor, but he asked Connie G. nothing about her jobs, and she was seated as a trial juror.

Finally, respondent attempts to defend the prosecutor's reason – characterized by the prosecutor himself as "ambiguous" – based on Selina S.'s purported "very disturbing" and "odd" questionnaire answers. In response to appellant's argument that there was nothing remotely unusual about Selina S.'s questionnaire responses, respondent accuses appellant of "miss[ing] the point," and asserts that the prosecutor's "instinctive assessment" was a constitutionally proper "hunch" that justified his peremptory challenge. (RB 82-83, citing *J.E.B. v. Alabama* (1994) 511

U.S. 127, 148 (conc. opn. of O'Connor, J.).) Characterizing a prosecutor's reason as a "hunch," however, cannot be used as a shield against a discriminatory strike. The use of comparative juror analysis starkly reveals that the prosecutor's "hunch" in this case was nothing more than a pretext.

As noted in the opening brief, the questions on the juror questionnaire were redundant and resulted in repetition of information requested from the prospective jurors. (AOB 64-65.) In addition, when Selina S.'s answers are compared to a white seated juror, it is clear they are in no way either as lengthy nor as "odd" or "disturbing." Walid Z.'s questionnaire contained lengthy answers, including his response to the question whether there was any reason he could think of why he would not be an impartial juror. Walid Z. described his negative experience in a small claims case he filed. He answered the question, and then continued his answer for another full page on the "Explanation Sheet" provided at the end of the questionnaire. (2 Supp. CT 2306; AOB 67-68.)

Similarly, Beverly B.'s questionnaire contains several long answers, some of which are repetitive. She wrote nearly a page on the "Explanation Sheet" reiterating her beliefs about the criminal justice system. (2 Supp. CT 2530.)

Taken together, the evidence in the record clearly reveals that the prosecutor struck prospective juror Selina S. because of her race, not because of her previous job, her questionnaire answers or her feelings about the death penalty.

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C. Conclusion

Appellant raised an inference that the prosecution had excluded Ms. Safari on account of race, and the burden should have shifted to the prosecution to articulate a race-neutral explanation of the peremptory challenges in question. The trial court's refusal to find that appellant had established a prima facie case of discrimination with respect to the challenge of Selina S. is not supported by substantial evidence. A review of the prosecutor's proffered reasons demonstrates his discriminatory intent in dismissing Selina S., and reversal of appellant's conviction and judgment of death is required.

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IV

THE TRIAL COURT ERRED IN ADMITTING EXTENSIVE AND HIGHLY INFLAMMATORY EVIDENCE OF UNCHARGED MISCONDUCT

A. Introduction

Over one-third of the evidence presented at the guilt phase of appellant's trial consisted of testimony of victims of alleged uncharged misconduct. Four witnesses testified about alleged fraudulent dealings with appellant, one witness described a violent physical attack, and three women testified in exhaustive detail about sexual assaults. This evidence was undeniably prejudicial. Despite the extensive testimony of these witnesses, and despite the lack of any defense guilt phase evidence, the jury still took 14 hours to reach a verdict as to appellant's guilt. This was true even though trial counsel conceded appellant's identity and the killing as second degree murder (RT 2234-2235), so that the jury had only to decide whether the murder was first degree murder and the special circumstances. Respondent defends admission of the extraordinary amount of uncharged misconduct evidence as legally permissible on various grounds. Respondent's argument attempts to avoid what is abundantly clear: without the evidence of uncharged offenses, the jury would not have found first degree murder or the special circumstances based on attempted rape, rape or robbery.

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B. Evidence of Alleged Fraudulent Behavior by Appellant was Not Relevant to Prove the Robbery-Murder Special Circumstance

Respondent asserts that the testimony of Helen Waters, Karrie Marshall, Leticia Busby and Teri Baer[8] about their financial dealings with appellant was admissible "because it was relevant to proving robbery." (RB 91.) Respondent argues that because trial counsel conceded appellant killed Sara Weir, but challenged the evidence of a robbery, the prosecution was permitted to present evidence that on other occasions appellant had attempted to fraudulently – and non-violently – get money from friends and acquaintances.

The least degree of similarity between the uncharged act and the charged offense is required to prove intent. Nevertheless, there must exist *some* similarity before prior acts are admissible. In the present case, there are none. As noted, respondent makes no attempt to defend admission of the testimony of Damon Stalworth – the owner of the restaurant where appellant allegedly bounced two checks. Helen Waters testified that she let appellant use her credit card to rent a car and he incurred $900 in fees for which she was never reimbursed. Leticia Busby refused to lend appellant her credit card. Karrie Marshall was a co-worker who testified that appellant offered to deliver money to her apartment to cover her paycheck that was returned for insufficient funds.[9] Respondent asserts that the uncharged misconduct

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[8] Respondent does not even attempt to justify the admission of testimony of Damon Stalworth, the owner of USA Ribs Restaurant who was permitted to testify that appellant bounced two checks at the restaurant.

[9] Respondent insinuates, despite any evidence in the record, that appellant was somehow responsible for making good on Marshall's paycheck. (RB 93.)

"demonstrated appellant's pre-existing intent to permanently deprive." (RB 93.)

This is precisely the "ill-defined" standard condemned by this Court in *People v. Balcom* (1994) 7 Cal.4th 414, discussed in the opening brief and ignored by respondent. (AOB 115-116.) Addressing the conclusion expressed in the concurring and dissenting opinion that other crimes evidence was admissible to show that a defendant "intended" to rape the victim, this Court made a critical distinction regarding use of the word "intent." This Court noted that evidence of the commission of a crime on another occasion, "in a manner different from the charged offense" is inadmissible under Evidence Code section 1101 as mere evidence of criminal disposition. (*Id*. at p. 423.)

Here, the charged offense was murder committed during a robbery, which is a felonious taking of personal property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear. (*People v. Harris* (1994) 9 Cal.4th 407, 415.) Thus, under *Balcom* and section 1101, evidence of the alleged crimes against Stallworth, Waters, Busby, and Marshall were inadmissible because they were committed *in a different manner from the charged offense*, murder during the commission of a robbery.

Respondent's theory of admissibility echoes that presented by the prosecutor at trial: "And I think that with the path that the defendant has taken in his life victimizing individuals it is clear what his motive, what his intent what, his motus [sic] operandi was, that's why it's critical for the jury to see that." (RT 305-306.) As explained in the opening brief, however, this is nothing more than propensity evidence, inadmissible under Evidence Code section 1101. (AOB 115-116.)

Respondent argues that the testimony of Marshall and Busby was relevant to show that "appellant harbored an intent to deprive his female victims of their property" (RB 93), because appellant was found in possession of Weir's property when he was arrested. Respondent parses one of the elements of robbery – the specific intent to deprive the victim of his or her property permanently – and argues that because this intent arguably existed during the uncharged offenses, evidence of those incidents was admissible to prove that appellant robbed Sara Weir. More is required to prove robbery than an intent to steal. Without the use of force or fear and a taking from the victim's person or immediate presence, an unauthorized taking is nothing more than a theft.

While the evidence of the charged offense *may* establish a *theft*, no other element of robbery was established. There is nothing in the record to show that Weir's checks or the keys to her car were in her possession at the time she was killed – either or both could have been in the car. There is no evidence that appellant took the items from her through the use of force or fear. She may have given the items to appellant, either voluntarily or through the use of guile on appellant's part. As a result, the record lacks any evidence of the critical elements of robbery – the *forcible* taking of property from the victim's person or immediate presence.

Even the prosecutor had a hard time articulating a theory of robbery. At one point, the prosecutor observed, "In the case of Sara Weir, maybe [appellant] panicked and took the checks. The jury needs to know that this is a man who knew that he could use and *deceive* women into *giving* him checks or *loaning* him money." (RT 269, emphasis added.)

Respondent relies on this Court's decision in *People v. Yeoman* (2003) 31 Cal.4th 93, to justify admission of the evidence of alleged

fraudulent behavior. (RB 92.) There, in a trial for murder and robbery, the trial court admitted evidence of an uncharged incident during which the defendant, after helping a woman in a parking lot change the tire on her car, attempted to kidnap and rob her using a knife and a gun. This Court held that the evidence of the uncharged incident was relevant to show the defendant's intent at the time of the charged offense. Because the defendant's actions during the uncharged offense were sufficiently similar to his later conduct against the charged victim, this Court found the evidence supported the inference that he probably harbored a similar intent to rob her when he stopped to help her with car trouble on the freeway. (*Id*. at p. 121.) The obvious difference between *Yeoman* and the present case is that the incidents with Waters, Marshall, Busby and Stallworth did not involve any force or fear, as the uncharged offense did in *Yeoman*.

The evidence of uncharged incidents of fraud or attempted fraud was not admissible to show force or fear. At the same time, it was highly effective in laying the groundwork for the prosecutor's depiction of appellant as a devious and frightening individual. As part of the far-reaching attack on appellant presented by the prosecution, its admission must be deemed prejudicial.

C. Evidence of the Assault of Michelle Theard Was Inadmissible to Prove the Burglary Special Circumstance

Respondent defends the trial court's admission of evidence of the assault of Michelle Theard as relevant to show "appellant's motive and intent for burglarizing Theard's apartment[[10]], and later, for committing the

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[10] At the close of the prosecution case, upon the joint motion of the defense and prosecution, Count 2 of the information, which alleged a residential burglary, and the burglary special circumstance were dismissed. (CT 431; RT 2041.)

crimes against Sara Weir in the apartment." (RB 96.)

Respondent makes the dubious argument that appellant's assault on Theard, which precipitated their breakup, "supported the prosecution's theory that appellant's rape, robbery and murder of Sara Weir were motivated by his anger at Michelle Theard." (RB 97.) In the case cited by respondent, *People v. Barnett* (1998) 17 Cal.4th 1044, evidence of defendant's assault on Racowski was deemed probative of his motive for the revenge killing and torture of the victim, Eggert. The evidence in *Barnett* showed a direct link between the Racowski assault and the Eggert murder: before the killing, the defendant said he would "get" Eggert for, among other things, "turning him in" for the assault on Racowski. No such evidence exists in the present case.

Respondent also claims evidence of the assault on Theard was admissible to explain her absence from the apartment during the time between Sara Weir's disappearance and when her body was found, and to explain the presence of the scissors on the night stand in the bedroom. (RB 97.) Certainly it was not necessary to present Theard's extended and graphic testimony of the assault to accomplish either of these two tasks. Theard could simply have testified that she was not living in the apartment at the time and that the scissors were left on the night stand. The rest of her testimony was irrelevant and indisputably prejudicial. The evidence should not have been admitted in the first place, but certainly once the burglary allegations were dismissed, the testimony should have been stricken and the jurors instructed not to consider it for any reason during their deliberations.

D. Evidence of Uncharged Sexual Assaults Was Inadmissible to Prove that a Rape or Attempted Rape Occurred

The allegations of sexual assault in this case were based solely on the fact that the victim's body was found unclothed, and on the other crimes evidence. Appellant argued in his opening brief that in the absence of *any* physical evidence of rape or attempted rape, evidence of his uncharged sexual assaults could not be used to establish that a rape or attempted rape occurred in this case.

In response, respondent incorrectly characterizes it as an argument that "there was insufficient other evidence to establish the corpus delicti of Sara Weir's rape" (RB 105), and asserts that apart from the evidence of uncharged sexual assaults, the record contains "more than enough other evidence to establish the corpus delicti of rape." (RB 106.)

It is not surprising that respondent would attempt to cast the argument in terms of corpus delicti, given the minimal amount of evidence required to satisfy a finding of criminal agency. Such evidence may be circumstantial and need only be a slight or prima facie showing "permitting the reasonable inference that a crime was committed." (*People v. Alcala* (1984) 36 Cal.3d 604, 624-625.) That, however, is not the issue here.[11]

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[11] This Court has not addressed the issue of whether other-crimes evidence can be used to establish the corpus delicti. The issue was raised in *People v. Jennings* (1991) 53 Cal.3d 334, where the defendant challenged the admission of his inculpatory statements, arguing insufficiency of evidence. This Court stated,

> In their respondent's brief, the People concede that the evidence supporting the corpus delicti of rape was "thin" but urge that the physical evidence, taken in conjunction with evidence of defendant's other crimes, comprises a prima facie

As set forth in the opening brief, the flaw in the reasoning of the court and the prosecutor, and now respondent, is the assumption that the circumstances surrounding Sara Weir's death were the same as those described by the other women, not because of any evidence presented, but because appellant had a connection to all of them. When, as in this case, uncharged misconduct evidence is used to establish the existence of a criminal act – i.e., the charged act must have occurred because the defendant has committed a similar act in the past – it is then nothing more than pure propensity evidence.

In *United States v. Gilbert* (1st Cir. 2000) 229 F.3d 15, the defendant was a nurse at the Veteran's Affairs Medical Center (VAMC), charged with murdering or attempting to murder several patients by intravenously poisoning them. The defendant denied that the patients were poisoned and claimed they died from natural causes. The district court ruled that the prosecution could not introduce evidence of an uncharged allegation of poisoning by defendant of her ex-husband. The Court of Appeals in upholding the district court's ruling as, inter alia, impermissible propensity evidence under Federal Rules of Evidence, rule 404(b) (analogous to Penal Code section 1101 (b)) observed:

> So far as we can tell, the presumed fact that Gilbert attempted

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> showing that a rape occurred. At oral argument, however, the People retreated from that position, instead arguing that even without the evidence of defendant's other criminal acts, a prima facie showing of rape existed. As we explain, we need not decide the admissibility of other-crimes evidence to establish the corpus delicti because the physical evidence, and reasonable inferences drawn therefrom, satisfy the corpus delicti rule.

(*Id.* at pp. 366-367.)

> to poison her husband in a non-VAMC setting tends to prove that the events underlying the charged crimes were the product of malicious human agency (and not naturally occurring) only if one first indulges an assumption that the odds of poisonings having taken place at the VAMC are increased by the presence of a demonstrated poisoner. Yet this is precisely the sort of assumption that Rule 404(b)'s preclusion of character evidence is designed to guard against.

(*Id*. at p. 24.)

In other words, proof that a criminal act occurred at all cannot be based on the defendant's prior uncharged acts. The example used by this Court in *People v. Ewoldt* (1994) 7 Cal.4th 380, illustrates the point. This Court noted that in a prosecution for shoplifting in which the defendant's presence at the scene of the alleged theft was conceded, evidence that the defendant had committed previous acts of shoplifting in a markedly similar manner might be admitted to show that he took the merchandise *in the manner alleged by the prosecution*. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) There must, however, be evidence to support the fact that a theft occurred or the merchandise was missing. But if the merchant – a shoe seller – found one of the shoe boxes empty at some time during the business day, the fact that the defendant – a demonstrated shoplifter – had been in the store could not be used to establish that a theft of the shoes had occurred.

In the present case, the act that the uncharged sexual assault evidence was ostensibly admitted to prove was the rape or attempted rape of Sara Weir. What is missing from the record in this case, and what the prosecutor tried to use the uncharged misconduct to prove, was evidence of the underlying crime of a sexual assault against Sara Weir.

Just as the prosecutor in appellant's case was forced to speculate about matters not proved by the evidence at trial, respondent resorts to

conjecture in characterizing the record. Respondent relies on the following as evidence apart from the uncharged misconduct evidence to support a finding of rape or attempted rape: "Sara Weir's naked body, Weir's September 7, 1993 telephone call[12], the injuries to her head and neck, the murder occurring while she laid [sic] on her back, and Coty's observations of a living, naked woman matching Weir's general description being dominated by a man matching appellant's description." (RB 107.)

The cited evidence is insufficient to support a finding of rape or attempted rape without resort to conjecture or distortion of the record.

1. Naked body

Respondent attempts to distinguish the cases cited in the opening brief – *People v. Granados* (1957) 49 Cal.2d 450; *People v. Craig* (1957) 49 Cal.2d 313; *People v. Anderson* (1968) 70 Cal.2d 15; *People v. Johnson* (1993) 6 Cal.4th 1– (AOB 159-163) that establish that a victim's lack of clothing is insufficient to establish specific sexual intent. (RB 138-139.) Respondent cites the case of *People v. Holloway* (2004) 33 Cal.4th 96, 138, in which this Court acknowledged the cases cited by appellant, but also observed that additional facts supported a finding of the defendant's intent to commit rape when he entered the victim's house. Those additional facts included evidence that the defendant attempted unsuccessfully to rape and then killed the other occupant of the house in a car outside the house shortly before he entered, and that the victim inside the house was found with

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[12] Respondent cites Weir's phone call to work the day after Labor Day in which she told her co-worker that she would not be coming in because of a friend's suicide, as untrue and an attempt to "cry out for help." (RB 107.) The record supports neither characterization, however. The testimony of Weir's mother and her roommate that they were not aware of any of her friends committing suicide does not prove the story false. The call as a "cry for help" was Weir's mother's interpretation.

evidence of binding of her ankles and wrists. (*Id*. at pp. 137-139.)

Respondent argues that the uncharged sexual assault evidence and Robert Coty's observation constitute analogous distinguishing evidence to that in *Holloway*. (RB 139.) As discussed below, however, Coty's observations do not provide all that respondent claims.

2. Condition of the Body

The statement by respondent, "the minimal amount of blood at the scene suggested that Sara Weir had been killed while she was lying on her back," (RB 106) is unsupported by the record. The prosecutor tried mightily to get someone to agree with his theory about the position of the body at the time of the stabbing, but was never able to do so. Respondent cites the testimony of the investigating officer, Detective John Coffey and the medical examiner, Dr. Eva Heuser, as support for this proposition, but review of that testimony shows that neither witness said what respondent now claims they did. The prosecutor several times posed a hypothetical to Detective Coffey, trying to get him to say that the lack of blood at the scene meant that the victim was killed while she was lying on her back, and thus the blood pooled inside the body. (RT 1421-1423.) Detective Coffey expressed an inability to answer the prosecutor's questions, and ultimately, he said precisely the opposite: there was no way to know whether she was standing or lying down at the time of the attack. (RT 1422.)[13]

Dr. Heuser agreed there was pooling of blood inside the body cavity (RT 2012-2013), but she offered no opinion of the position of the body at the time the stab wounds were inflicted.

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[13] Respondent's statement made in response to Argument IV is even more inaccurate: "Given the nature of her wounds and the minimal blood at the scene, the investigating detective opined that Weir had been killed while she was lying on her back. (RT 1422-1424.)" (RB 138.)

Respondent offers reasons for the lack of bruising to the mouth, vagina or rectum and of the absence of semen or spermatozoa, but refuses to acknowledge that the absence of such evidence is precisely that: a lack of evidence. (RB 106.) Respondent also fails to explain how the other injuries to the body demonstrate evidence of rape or attempted rape.

3. Robert Coty's Observations

Respondent relies to a great degree on the testimony of Robert Coty regarding his observations of an unidentified male and another person[14] inside Michelle Theard's apartment. Coty was not even sure of when he made his observations. He testified that he thought it was after Labor Day weekend, but he was not "110 percent sure. I think it was. I don't know." Even when he told the police he thought it was a Tuesday or Wednesday, he was not sure. (RT 1147.)

Evidence of a rape or attempted rape was lacking in this case, and thus, the uncharged crimes testimony should have been excluded on this basis. Contrary to respondent's assertion, the evidence was also inadmissible to prove intent, common plan or identity.

Intent

Respondent argues that the evidence of uncharged rapes was admissible to prove intent to kill, premeditation and deliberation, intent to

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[14] Respondent repeatedly refers to the other person as a woman (RB 107, 136, 137, 139) and accuses appellant of "disingenuousness" based on the assertion in the opening brief that witness Coty could not discern the gender of the person he saw in the room across the way from his apartment. (RB 136, fn. 51.) While respondent is correct that Coty *once* used the pronoun "she," he immediately corrected himself to say "the person," which was consistent with all the rest of his testimony. (RT 1143-1161.) In fact, the prosecutor himself was careful not to attribute a gender to the "the person." (See, e.g., RT 1153, 1157, 1159, 1160.)

commit rape, and intent to commit robbery. (RB 108-111.)

With respect to the alleged rape or attempted rape of Weir, evidence of other crimes is admissible to show intent, for example, to rebut consent, but only if appellant conceded that an act of sexual intercourse or attempted intercourse with Weir took place at the time of her death. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2 ["'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it,'" quoting 2 Wigmore, Evidence (Chadbourne rev. ed. 1979) § 300, p. 238].) No such concession occurred below and there is no basis in the record for assuming that appellant had or attempted to have sexual intercourse with Weir.

Regarding the probative value of the uncharged misconduct for the mental states for murder, at the risk of stating the obvious, none of the victims of the uncharged offenses was killed. Taking the witnesses' rendition of events as true, appellant had ample opportunity to kill all three of them, but did not, and let each of them leave. Thus, the uncharged offenses lack sufficient similarity to the charged offense of murder to justify admission on this ground.

Respondent also argues the evidence was admissible to prove appellant's intent to rob Weir, or at least to prove one element of robbery – the intent to permanently deprive her of property. (RB 109-110.) Initially, it should be noted that the prosecutor presented the testimony of the previous witnesses – Stallworth, Busby, Marshall and Waters – for this same purpose, so that additional evidence on this element should have been excluded as cumulative.

And, as with the alleged rape or attempted rape, there is no concession or assumption in the record that appellant took Weir's checks or

car keys at the time of her death. Hence, evidence of other crimes purportedly showing that appellant took property with the specific intent to permanently deprive persons of their property is inadmissible under *Ewoldt* and section 1101.

Moreover, a review of the testimony of Jodi D., Kim V. and Teri B. reveals that the facts of those incidents were neither similar enough, nor probative enough, to warrant admission of the testimony.

The admissibility of evidence of uncharged misconduct depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) In this case, the fact to be proved, according to respondent, was appellant's intent at the time of the killing, to rob or permanently deprive Weir of her property. (RB 109.)

Teri B.'s driver's license and two of her checks were found in appellant's briefcase. (RT 1828.) She testified she might have loaned appellant her license, although she did not remember doing so, and she had no idea how he got the checks. (RT 1836-1838.) These facts in no way support a finding of a taking, forcible or otherwise. The facts of the incidents involving Jodi D. and Kim V. are not sufficiently probative on this issue to justify their admission.

To find robbery felony murder or the robbery-murder special circumstance, the jury must find beyond a reasonable doubt that the murder was committed while the defendant was engaged in the commission of the robbery *and* that the murder was committed in order to carry out or advance the commission of the crime of robbery. (*People* v. *Green* (1980) 27 Cal.3d 1, 54.) To support a robbery conviction, the evidence must show that the intent to steal arose either before or during the application of force. (*People*

v. Morris (1988) 46 Cal.3d 1, 19, overruled on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535.) "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft." (*Ibid*.) The wrongful intent and the act of force or fear must "concur in the sense that the act must be motivated by the intent." (*People v. Green, supra*, 27 Cal.3d at p. 53.)

According to Kim V.'s testimony, while they were in appellant's hotel room, before the alleged sexual assault, appellant pulled off the bag she wore around her waist that contained her passport, airline ticket and money, threw it across the room and said, "this is not what I'm after." (RT 1672-1673.) Jodi D testified that appellant took her jewelry and her watch during the course of the alleged assault. (RT 1547.) When she asked for it back, appellant said he needed it for something, but would give it back to her if she would meet him in front of the Olive Garden Restaurant at noon the next day. (RT 1561.)

Nothing about these facts suggests that the sexual assaults were motivated by the intent to take property from either victim. As noted previously, while the least degree of similarity between the uncharged and charged offenses is required to establish intent, there must be sufficient similarity in order for the evidence of the uncharged offense to have some logical relevance. The fact that property was taken *without force or fear* from two of the victims of the alleged sexual assaults does not make the uncharged offenses sufficiently similar to support a rational inference of an intent to take by force or fear in the charged case. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

Common Design or Plan

Respondent claims that the similarities between the charged and

uncharged offenses "demonstrate that, when appellant committed the offenses against Sara Weir, he was acting pursuant to a common plan or design to rob, forcibly rape, and then intentionally kill her with premeditation and deliberation." (RB 112.)

Respondent alleges, "the charged and uncharged conduct was practically identical: in all four cases, appellant cultivated friendships with his victims, all of whom were young women; he lied to the women regarding his true profession; and he lured them to his residence where he committed the crimes against them." (RB 112.)[15] This argument assumes, just as the trial court and prosecutor did, that the incident with Sara Weir was the same as those with the other three women, when in fact, aside from the friendship between appellant and Weir, there are no other similarities. Appellant did not lie to Weir about his true profession – he did train her at the gym – and there is no evidence that he "lured" her to his residence. The record shows that on at least two occasions Weir went to appellant's apartment voluntarily. Respondent ignores evidence in the record that appellant and Weir had a friendly relationship. She had been to his apartment, had met Michelle Theard and even invited appellant, Theard and her son to the mountains for a weekend. Even after Weir commented to her friends that

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[15] In addressing appellant's argument that the three uncharged sexual assaults were spontaneous acts and not part of a common plan or design, respondent again distorts statements made in the opening brief. Respondent states, "Rather, the incidents show that 'appellant had a *plan* to cultivate friendships with young women, lure them into his room and sexually assault them,' and that is *exactly* 'what happened during each of the incidents.'" (RB 115, citing AOB 112-113.) The sentence from the opening brief reads: "To say that appellant had a *plan* to cultivate friendships with young women, lure them to his room and sexually assault them is to ignore what actually happened during each of the incidents." (AOB 112-113.)

appellant's flirting was unwanted, she continued training with him at the gym.

Respondent's assumptions about the similarities between the uncharged offenses and the charged offense are nothing more than that – assumptions. As set forth in detail in the previous section, the record does not support the notion of a series of robberies, and certainly does not contain evidence of previous killings. For this reason alone, respondent's reliance on *People v. Kipp* (1998) 18 Cal.4th 349, is misplaced.

Identity

Respondent claims that the prosecutor was permitted to introduce the uncharged rape evidence because of his burden to establish appellant's identity as the killer. (RB 116.) Appellant does not disagree that identity was an issue that the prosecutor was required to prove, but because there was ample other evidence to establish this point, admission of voluminous, graphic and disturbing testimony about three other sexual assaults was clearly cumulative.

E. The Probative Value of the Other Crimes Evidence Was Vastly Outweighed by its Prejudicial Effect

As respondent acknowledges, other crimes evidence is inherently prejudicial and should be admitted only if it has substantial probative value. (RB 117, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 380.) There is no question but that the extensive evidence of uncharged offenses admitted in this case was so prejudicial and its probative value so slight that it should never have been admitted.

The testimony regarding the alleged fraudulent dealings lacked *any* probative value because it was wholly irrelevant to prove the robbery-murder special circumstance. Admission of such evidence served only to

introduce appellant to the jury in a most unfavorable light. Similarly, Michelle Theard's testimony of a violent attack by appellant added nothing to proof of the charged offenses, but continued the prosecutor's theme of appellant's violent nature.

In response to appellant's argument that the prejudicial effect of the uncharged evidence was heightened by the fact that appellant's uncharged acts resulted in little or no criminal punishment (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405), respondent cites the case of *People v. Callahan* (1999) 74 Cal.App.4th 356, 371. Based on that case, respondent asserts that the possible prejudice was reduced because the jury was not told about any subsequent legal action. *Callahan* does not stand for this proposition, however. There, in a prosecution for sexual assault, the trial court admitted evidence of a prior sexual assault for which the defendant was convicted under section 1101. On appeal, defendant argued that because the jury was not informed of his conviction for the offense, the jury was more likely to punish him for his actions in that case. But in *Callahan* it was the defendant who successfully moved to exclude evidence of the conviction itself. (*Id*. at p. 372.) Moreover, the defendant testified at trial that he was on parole, a condition of which was that he could not be around children under the age of 18, evidence from which the jury could have inferred that he was criminally convicted as a result of the uncharged incident. (*Ibid*.)

Respondent does not and apparently cannot address the argument in the opening brief that the probative value of Teri B.'s testimony was diminished by her awareness of the circumstances of the charged offense. (AOB 117-118.) Similarly, respondent avoids addressing the prejudicial effect of the sheer volume and graphic nature of the three women's testimony on the jurors' ability to rationally consider appellant's liability for

the charges before them. (AOB 119.)

F. The Admission of Bad Character Evidence Violated Appellant's Constitutional Rights, and the Error was Not Harmless

Appellant asserted in the opening brief that admission of the uncharged misconduct evidence violated appellant's right to due process under the Fourteenth Amendment. (AOB 122.) Respondent claims the due process challenge is waived because trial counsel objected to admission of the evidence under Evidence Code section 352, and argues that any error was harmless only under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 118-119.) Since respondent's brief was filed, this Court decided the case of *People v. Partida* (2005) ___ Cal.4th ___ [35 Cal.Rptr.3d 644], which held that where a trial court admits evidence over a defendant's objection, the defendant may argue on appeal "that the asserted error in overruling the trial objection had the legal consequence of violating due process." (*Id.* at p. __ [35 Cal.Rptr.3d at p. 646].) Respondent's failure to address the error under the standard of *Chapman v. California* (1967) 386 U.S. 18, 23, should be treated as a concession that the erroneous admission of this evidence was not harmless beyond a reasonable doubt.

Respondent's argument that any error in admitting the uncharged crimes evidence was harmless ignores the fact that the testimony constituted over a third of the prosecutor's entire case and most of his closing argument. The prosecutor was well aware that without this evidence at the guilt phase,[16] appellant would not have been convicted of first degree murder and

[16] Respondent's observation that the uncharged evidence would have been admissible at the penalty phase is irrelevant to a discussion of the prejudice from admission of the evidence at the guilt phase. (RB 121.)

special circumstances.[17]

Respondent's argument that this was not a close case is unconvincing, as demonstrated by the failure to cite any authority – nor respond to the authority cited by appellant – for the proposition that 14 hours of deliberations by a jury who heard no evidence at all from the defense does not indicate that the jury struggled with the issue of appellant's guilt. (RB 122.)

The admission of wholly irrelevant and highly inflammatory evidence of uncharged misconduct rendered appellant's trial fundamentally unfair and requires reversal of the conviction, special circumstances findings and death judgment.

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[17] The trial court acknowledged the devastating impact of the other crimes evidence when it ruled that the prosecutor could present a videotape of the victim's life at the penalty phase. The court stated, "I think . . . what this jury has heard from many other people makes this tape pale." (RT 2431.)

V

APPELLANT WAS REPEATEDLY DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO BE PRESENT AT ALL CRITICAL STAGES OF TRIAL

Respondent offers a cursory response to appellant's argument that he was wrongfully excluded from several proceedings during his trial. (RB 124-126.) Initially, respondent's characterization of these proceedings as "in camera hearings [and] sidebars" is deliberately misleading and should be rejected, for, as set forth in the opening brief, the hearings at issue were critical proceedings at which appellant's presence was required. These include the hearing on trial counsel's *Wheeler* motion, a hearing and ruling on the prosecutor's challenge for cause of another African American juror, and the challenge of a juror on the basis of his death qualification. In addition, appellant was excluded from hearings on the admissibility of evidence regarding the victim's drinking habits and a hearing at which the prosecutor revealed new evidence about an additional sexual assault allegation. (AOB 130-140.)

Respondent claims that the presence of defense counsel satisfies the statutory and constitutional requirements of appellant's presence (RB 126) and dismisses the significance of the cases of *People v. Ayala* (2000) 24 Cal.4th 243, and *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, discussed in the opening brief. (AOB 129-133.) Respondent concludes: "as appellant himself points out, both *Ayala* and *Thompson* involved the exclusion of both 'the defendant and his attorney'" (RB 126), but then fails to address – indeed even to mention – appellant's discussion of the issue in

the opening brief.[18]

Moreover, respondent's position ignores completely appellant's individual constitutional right to be present, apart from his right to counsel.

> "A criminal defendant's right to be *personally* present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution . . . . [Citations.] A defendant's presence is required if it "bears a reasonable and substantial relation to his full opportunity to defend against the charges." [Citation.]

(*People v. Lucero* (2000) 23 Cal.4th 692, 716-717, emphasis added; see *People v. Waidla* (2000) 22 Cal.4th 690, 742.)

The standard under Penal Code sections 977 and 1043 is similar. "[T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him . . . . [Citation.]" (*People v. Ervin* (2000) 22 Cal.4th 48, 74; *People v. Waidla*, *supra*, 22 Cal.4th at p. 742.)

The manner in which appellant's presence might have significantly affected the proceedings is discussed at length in the opening brief, but not

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[18] "However, in discussing the error, neither the majority nor the dissenting opinion made a distinction between the exclusion of the defendant and his attorney. (*See e.g.*, *People v. Ayala*, *supra*, 24 Cal.4th at p. 262 ["error to exclude defendant from participating in the hearings on his *Wheeler* motions" and referring to the lack of "facts and law from the defendant"]; *id*. at pp. 263-264 [discussing danger that "defendant's inability to rebut the prosecution's stated reasons will leave the record incomplete]; *id*. at p. 292, disn. opn. of George, C.J. ["seen in this light it becomes clear why a defendant must have the right to be present with his counsel"]; *ibid.* ["the presence of the defendant and his or her counsel may assist the court in probing the prosecutor's stated reasons"]; *id*. at p. 293 ["defense counsel (possibly assisted by the defendant) might be able to shed light on the matter"]; *id.* at pp. 293-294 ["under . . . today's decision a defendant has a right to be present and have his or her counsel orally rebut the prosecution's justifications"].) (AOB 131, fn. 50.)

mentioned at all by respondent. For example, appellant described how his presence during the *Wheeler/Batson* proceedings might have assisted the court in finding a prima facie case of discrimination, or assisted trial counsel in rebutting the reasons offered by the prosecutor. (AOB 131-132.) In addition, appellant spelled out in detail how, had he been present during the discussion of Sara Weir's drinking habits or Teri Baer's newly revealed rape allegation, he could have assisted counsel in persuading the court to adopt the defense side of the issue presented. (AOB 137-139.) Again, rather than addressing appellant's argument, respondent simply dismisses it as "unduly speculative." (RB 126, citing *People v. Cole* (2004) 33 Cal.4th 1158.) In *Cole*, the proceedings from which the defendant was absent were portions of two sessions related to defense counsel's motion to continue the trial date. Defendant argued that had he been present, he could have provided information in support of the motion to continue. But, as this Court observed in rejecting the claim, defendant was present for part of one of the sessions and could have given the court or counsel any information he had at the time. Moreover, unlike in the present case, the information the defendant could have offered was not significant enough to have arguably affected the outcome of the proceeding from which he was initially excluded. (*Id*. at p. 1232.)

In *People v. Holt* (1997) 15 Cal.4th 619, 706, also cited by respondent (RB 126), this Court held that the defendant's presence at the several hearings from which he was absent would not have had any impact. As noted in the discussion of *Holt* in the opening brief, however, this Court relied on the fact that the defendant prevailed in each of the matters discussed during the proceedings. (*Id*. at p. 707.) Here each of the rulings at the hearings from which appellant was excluded went against him, and his

contribution to the proceedings may well have convinced the trial court to rule in his favor. (AOB 138-139.)

Finally, *People v. Hardy* (1992) 2 Cal.4th 86, and *People v. Bittaker* (1989) 48 Cal.3d 1046, cited by respondent, are distinguishable from the present case not only because of the nature of the proceedings from which the defendants were excluded, but also because of the evidence of what the defendants could have contributed to the proceedings had they not been excluded.

In *Hardy*, the defendant was absent for short periods during two voir dire sessions in which hardships excuses by prospective jurors were considered. The defendant offered no explanation of how his presence could have made a difference at any of the sessions. (*People v. Hardy*, *supra*, 2 Cal.4th at pp. 177-178.) The defendant in *Bittaker* was absent during seven different proceedings, six of which this Court held involved strictly legal matters, and at which the defendant had neither a statutory nor a constitutional right to be present. At one of the proceedings – a hearing on trial counsel's motion to continue based on the revelation of a new prosecution witness – this Court observed that the defendant should have been present. His absence, however, was not prejudicial because the trial court continued the hearing until the next court session, at which the defendant was present, and the witness in question did not testify until later in the trial, affording the defendant an opportunity to impart any useful information to his attorney.

Appellant has offered concrete examples of how his presence could have made a difference at the proceedings from which he was excluded. Respondent has chosen not to address these points, thus effectively conceding that if this Court finds appellant was wrongfully excluded from

the proceedings in issue, his absence was prejudicial, and reversal of the judgment is mandated.[19]

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[19] Respondent asserts appellant is incorrect in claiming that respondent bears the burden of proving prejudice. (RB 126, fn. 46.) But, because appellant was excluded from proceedings where his presence had a reasonably substantial relation to the fullness of his opportunity to defend against the charge (*United States v. Gagnon* (1985) 470 U.S. 522, 526; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107, overruled on other grounds by *Malloy v. Hogan* (1967) 378 U.S. 1, 84; *People v. Waidla, supra,* 22 Cal.4th at p. 742), he was also denied his rights under the federal constitution, and the *Chapman* harmless error standard therefore applies. (*Chapman v. California, supra,* 386 U.S. pp. 25-26.).

VI

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FELONY MURDER CONVICTION BASED ON ROBBERY AND THE ROBBERY SPECIAL CIRCUMSTANCE FINDING

When a defendant challenges the sufficiency of evidence, it is the province of the appellate court to review the evidence presented at trial to determine the sufficiency of that evidence to support the convictions. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Appellant's argument that the trial record contains insufficient evidence to support the felony murder conviction and the special circumstance finding based on a theory of robbery is more than "reargu[ing]" the evidence and "ask[ing] this Court to reach a different conclusion," as respondent asserts. (RB 127.)

Missing from the record in this case is sufficient evidence to establish the necessary concurrence of intent to steal and the act of force. There is no evidence that appellant killed Weir for the purpose of taking her car, or the two uncashed checks found in his possession at the time of his arrest, two months after the killing.[20]

Respondent argues that the jury reasonably could have found that

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[20] As respondent does throughout the brief, here he takes a quotation from appellant's opening brief and claims it is a concession. Contrary to respondent's assertion, appellant does not "concede[] that his possession of the 'uncashed checks "supports an inference that he took them from Weir or her immediate presence . . . ."'". (RB 130, citing AOB 147.) Citing the prosecutor's argument that appellant took items from his victims, including Weir, for the purpose of domination, appellant argued that, given appellant's possession of the uncashed checks when he was arrested, it was highly unlikely they were so valuable to appellant that he would kill Weir to get them. (AOB 148.) Indeed, there is no evidence at all of when the checks were obtained.

appellant took the checks and car keys from Weir by the use of force or fear, prior to killing her, based on: appellant held Sara Weir captive for many hours, if not days, before killing her; Weir's body had several antemortem injuries; the uncharged offenses against Jodi D., Kim V. and Teri B. demonstrated that appellant was acting pursuant to a pre-existing plan to rob and rape Weir. (RB 130-131.) Respondent's interpretation of the evidence cited is impermissibly speculative and constitutionally inadequate to support a finding of robbery for purposes of the first degree felony murder conviction or the special circumstance allegation. (RB 130.)

For example, the assertion that appellant held Weir captive in the apartment for hours or even days is sheer speculation. As previously discussed, respondent characterizes Weir's telephone call to work the Tuesday after Labor Day in which she told her co-worker that she would not be coming in because of a friend's suicide, as untrue and an attempt to "cry out for help." (RB 107.) The record supports neither characterization. The testimony of Weir's mother and her roommate that they were not aware of any of her friends committing suicide does not prove the story false. The call as a "cry for help" was Weir's mother's interpretation. According to witness Rosell Momon, appellant called him that day and said he was with a woman other than his girlfriend, but appellant did not say where he was, and Momon had no way of knowing where appellant was when he made the call, or who he was with. (RT 1136-1137.)

Robert Coty's testimony that he saw a person in Theard's apartment is not nearly as definitive as respondent's description of observations made "on the same day or the day after [the Tuesday after Labor Day]" of "a woman matching Sara Weir's general description being dominated by a man matching appellant's general description." (RB 130.) In reality, Coty

testified he "was not 100 percent sure," he made his observations after Labor Day weekend; he could not remember exactly what day it was. (RT 1147.) Through the window, he saw a black male and a Caucasian person[21] with dark hair, sitting or kneeling, with no clothes on from the waist up. (RT 1153.) Coty had the impression that the person who was kneeling or sitting was being dominated or scolded even though he never saw the man touch the other person. (RT 1159, 1160.) He saw no hitting or striking and heard no yelling or screaming coming from the apartment. (RT 1159.) Respondent relies on the uncharged misconduct evidence to argue that appellant had the intent to steal Weir's property at the time of the killing. (RB 131.) As discussed previously in Argument IV, the evidence of alleged fraudulent behavior and the testimony of the three women who testified to alleged sexual assaults was neither sufficiently similar nor probative to raise a rational inference that appellant harbored an intent to rob at the time of Weir's killing.

Respondent claims appellant's reliance on this Court's opinion in *People v. Morris* (1988) 46 Cal.3d 1 is "misplaced," but fails to offer any reasons why the case is distinguishable. (RB 132.) Instead, respondent again insists that the uncharged misconduct evidence provides sufficient evidence of a pre-existing intent to satisfy the requirements for proving robbery in the instant case. (RB 132-133.)

Appellant will not repeat the arguments previously made, but simply note that even the prosecutor at trial was not confident of the strength of the evidence of robbery, as demonstrated by his guilt phase closing argument in

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[21] As previously discussed, respondent's characterization of the person as a woman is contrary to Coty's consistent use of the term "person," rather than "woman" throughout his testimony.

which he urged the jury to find the robbery-related allegations because, "It's a complicated legal system, complicated appellate procedures. If the defendant is guilty of two crimes, you know, who knows what's going to happen with one. Let's say it gets overturned." (RT 2184.)

Based on the insufficiency of evidence of robbery, this Court should reverse the judgment in its entirety.

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VII

THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF FIRST DEGREE MURDER ON A THEORY OF RAPE OR ATTEMPTED RAPE FELONY MURDER

As the prosecutor did at trial, respondent relies primarily on evidence of uncharged sexual offenses and the testimony of Robert Coty to argue that the record contains sufficient evidence of rape or attempted rape. (RB 134-142.) The speculative nature of respondent's argument has been discussed at length in Argument IV, *supra*, and those points will not be repeated here.

In this section, respondent expands upon the previous argument and attempts to discount the significance of the lack of physical evidence of rape or attempted rape. Quoting *People v. Berryman* (1993) 6 Cal.4th 1048, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1, respondent argues that the lack of evidence of trauma to Weir's vaginal or rectal area "is not inconsistent with consensual intercourse." (*Id*. at p. 1084, citation omitted.) Appellant does not disagree with the general proposition cited, but notes that in *Berryman*, there was evidence of sperm in the victim's vagina that demonstrated penetration, and further, the condition of her clothes and body suggested a violent sexual assault. (*Ibid*.)

Regarding the lack of evidence of semen or sperm, respondent again offers reasons why such evidence may never have existed, such as a failure to ejaculate or the use of a condom. (RB 139-140.) In the alternative, if any such physical evidence existed at one time, it may have been impossible to detect, due to the decomposition of the body. (RB 140.) Respondent argues that, "the absence of *undetectable* evidence, resulting from appellant's successful hiding of Weir's body, does not warrant overturning the jury's finding of rape. A contrary result would offend justice." (RB 140-141,

citing *People v. Jennings*, *supra,* 53 Cal.3d at pp. 368-369, emphasis in original.)[22] But reliance on *Jennings* is misplaced, because there the defendant had made admissions about raping the victim, and the question before the court was whether the physical evidence was sufficient to establish the corpus delicti of rape and open the door to admitting the defendant's statements. The case does not stand for the proposition suggested by respondent, namely that if potential physical evidence is lost because of the defendant's actions, the prosecution can speculate about what the evidence might have been.

Finally, respondent relies on *People v. Marshall*, (1997), 15 Cal.4th 1, as authority for finding sufficient evidence of attempted rape. (RB 141.) The victim in *Marshall* was found gagged, with her underwear and pants pulled down, gagged and with abrasions on her body. Witnesses reported hearing cries for help coming from the abandoned apartment building where her body was found, and where, a month earlier, the defendant had announced his intention to rape and kill another woman who managed to escape. The defendant was stopped leaving the building shortly after the murder with a paper belonging to the victim and blood matching hers on his clothing. (*Id*. at p. 36.) These facts differ significantly from those in the present case, in which, contrary to respondent's claim, the record contains no evidence of appellant having "committed numerous acts toward the commission of the crime" of rape. (RB 141.)

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[22] Respondent does not offer an explanation of how "undetectable" evidence differs from "non-existent" evidence.

Without sufficient evidence to sustain the finding of first degree murder on the theory of rape or attempted rape, the conviction must be reversed.

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VIII

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF PREMEDITATED AND DELIBERATE FIRST-DEGREE MURDER

In the opening brief, appellant argued that the record contained insufficient evidence of premeditation and deliberation to support a finding of first degree murder. Missing from the record is evidence of (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing that demonstrate premeditation and deliberation.

Respondent asserts that evidence of planning comes from an inference that appellant lured Weir to his apartment on Labor Day and held her captive there for days before killing her. According to respondent, appellant had ample time to premeditate the killing before or during the time Weir was at the apartment. (RB 144.) As set forth previously, however, respondent's assertions are based on speculation: no evidence exists that Weir was "lured" to the apartment, or when she arrived; Robert Coty's testimony does not establish with any certainty either the gender of the person he saw in the apartment, or even on which day he made his observations. The lack of such evidence distinguishes the present case from *People v. Rich* (1988) 45 Cal.3d 1036, cited by respondent. (RB 144.) In *Rich*, this Court upheld the first degree murder conviction as to one of the victims on the basis of premeditation and deliberation. The opinion contains few facts about the murder, but this Court explained that "the evidence showed that defendant lured her out of the bar and drove her to the Igo dump. . . ." (*Id*. at p. 1082.) No comparable evidence that appellant lured Weir to the apartment is present in this case.

Respondent claims that appellant's motive for Weir's killing was

revenge against Michelle Theard, as demonstrated by the placement of the body. Granted, this was a theory posited by the prosecutor during his closing argument, but it had no basis in the record – no statements by appellant evidencing such feelings, nor any other basis for inferring a premeditated and deliberate murder upon Weir in retaliation for Theard's obtaining a restraining order against appellant. Moreover, this theory is at odds with respondent's assertion that appellant killed Weir in order to rob her.

Respondent also argues that appellant's hatred of women supplied a motive to commit first degree murder, but fails to point to any evidence that appellant was driven by such feelings to kill Weir. (RB 144-145.) Respondent's reliance on *People v. Steele* (2002) 27 Cal.4th 1230, 1250, is misplaced. There, the defendant told the police after his arrest that he hated women. This statement, coupled with the defendant's nearly identical killing of another woman prior to the charged victim, supported a finding of motive for a premeditated killing. Neither fact exists in the present case. Nor is this case comparable to *People v. Pride* (1992) 3 Cal.4th 195, cited by respondent. (RB 145.) In *Pride*, there was strong evidence of a sexual assault – the victim's nearly nude body was found on top of a black pubic hair on a semen-stained portion of carpet. (*Id.* at p. 247.) Moreover, there was evidence of a motive to kill the victim because she had complained about the defendant's work, as well as evidence that the defendant planned the fatal encounter with the victim in order to kill her. (*Ibid.*) No comparable evidence exists in the present case.

Finally, respondent asserts that the manner of killing supports a finding of premeditation and deliberation. (RB 145.) Respondent relies on the medical examiner's testimony that the wounds to Weir's heart would

have rendered her unconscious, and speculates that the remaining stab wounds were inflicted while Weir lay unconscious. (RB 145-146.) The record contains no evidence about the order in which the wounds were inflicted.

Respondent does not address any of the cases cited in the opening brief that attribute multiple, scattered wounds inflicted on a victim as evidence of "unconsidered explosion of violence" rather than a calculated method of killing. (*People v. Pride, supra*, 3 Cal.4th at p. 248; AOB 173-174.) Instead, respondent cites the presence of the plastic bag and baseball helmet as evidence of premeditation and deliberation, relying on *People v. Perez* (1992) 2 Cal.4th 1117, 1128, in which this Court found that the defendant's actions after the killing supported a finding of premeditation and deliberation. (RB 146.)

Appellant submits that actions taken after the stabbing do not provide sufficient evidence of the existing state of mind at the time of the attack. As discussed in the opening brief, in *People v. Tubby* (1949) 34 Cal.2d 72, the defendant was seen beating the victim, his stepfather, in the yard outside the house and then dragging the victim into the house where the sounds of a continued beating continued for several minutes. (*Id*. at p. 75.) On appeal, the defendant argued the record did not support a finding of premeditated murder. This Court agreed, rejecting the prosecution argument that the defendant's actions in dragging the victim into the house to continue the beating demonstrated a premeditated and deliberate killing. While acknowledging that it was reasonable to infer that the defendant dragged the victim into the house to continue the assault, "that in itself would not warrant the further inference that with a preexisting intent he set about to kill his stepfather." (*Id*. at pp. 78-79.)

Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding that appellant premeditated and deliberated the killing, and reversal of the conviction is mandated.

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IX

THE TRIAL COURT ERRONEOUSLY FAILED TO DEFINE RAPE AND ROBBERY, THE TWO UNDERLYING OFFENSES ALLEGED TO SUPPORT THE FELONY MURDER CHARGE

The trial court failed in its *sua sponte* obligation[23] to define the elements of rape or robbery in connection with the felony murder charge. The error goes beyond what respondent has framed as the issue – the mere sequence of instructions. (RB 151.) As explained in the opening brief, the jury was instructed on the underlying elements of robbery and rape only in connection with the special circumstances. (RT 2144-2148.) Respondent argues that the instructions defining the elements of the underlying felonies were not limited to the special circumstance allegations, and therefore the jury would know that the instructions applied to the felony murder instruction. (RB 150.) This argument must fail because, in fact, the court prefaced the definition of attempted robbery and rape by stating: "This instruction applies only to the special circumstance instruction." (RT 2144.)

Respondent next characterizes any instructional error as harmless because the jury found true the special circumstances based on rape and robbery (RB 151), citing cases in which the jury had been properly instructed on felony murder as well as the special circumstance. In other words, this Court did not use the subsequent instructions from the special circumstances

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[23] Respondent argues that the issue is waived based on trial counsel's failure to seek "clarification" regarding the sequence of the instructions. (RB 148-149.) Appellant submits that because it was the court's duty to define the underlying felonies in connection with the felony murder instruction *sua sponte*, counsel's actions do not constitute waiver.

to attempt to relate back and cure corrupted felony murder findings. (*People v. Hughes* (2002) 27 Cal.4th 287; *People v. Marshall*, *supra*,15 Cal.4th 1; *People v. Haley* (2004) 34 Cal.4th 283.) Respondent conspicuously fails to address this point, raised in the opening brief. (AOB 185-186.)

Reversal of the murder conviction is required because of the trial court's error in failing to instruct the jury on the underlying felonies for felony murder and because there is insufficient evidence in the record to support any other theory of first degree murder.

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THE TRIAL COURT DELIVERED AN ERRONEOUS FELONY MURDER JURY INSTRUCTION THAT ELIMINATED A FINDING OF INTENT TO COMMIT THE UNDERLYING FELONIES

This Court should reach the merits of appellant's claim that the erroneous felony murder instruction delivered to the jury at the guilt phase permitted the jurors to find felony murder without making the requisite finding of intent to commit the underlying felonies. Respondent's assertion that the claim is waived because trial counsel failed to request clarification should be rejected. (RB 154.) Appellant was entitled to assume that the trial court would discharge its duty to deliver the correct jury instructions. In this case, that did not happen and appellant is now entitled to have this Court determine the merits of the claim of error.

Respondent ignores the plain language of the instruction as it was delivered to the jury by arguing that it was not misleading. The instruction was phrased in the disjunctive such that only the second part of it referred to the crimes of rape and robbery. The fact that the second part of the instruction refers to the specific intent necessary for commission of those crimes only underscores the separate nature of the two options in the instruction's first paragraph.

Once again, respondent takes a sentence from the opening brief out of context and erroneously claims that appellant has conceded the point. (RB 156.) In an argument challenging the trial court's instruction on first degree murder, appellant listed the instructions read by the court and included CALJIC No. 8.21. (AOB 213.) Appellant does not dispute that the court instructed the jurors that they could find felony murder based on a killing during the commission or attempted commission of a rape or robbery.

Rather, appellant has argued that the court's erroneous instruction also allowed the jury to find felony murder *without* making such a finding because the instruction was phrased in the disjunctive.

Respondent claims that any error in the instruction was harmless because the jury's findings on the special circumstances demonstrate that the jury necessarily found every element of first degree murder under a felony murder theory. (RB 157.) As noted previously, however, the jury's consideration of the special circumstances was very likely affected by having already found appellant guilty of first degree murder using faulty instructions.

The error was prejudicial and requires that the first degree murder conviction, special circumstance finding, death verdict and ensuing judgment be reversed.

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XI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

In his opening brief, appellant argued that based on the charges in the information, the instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder. (AOB 196-205.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB 158-161.) Accordingly, no reply is necessary.

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XII

THE TRIAL COURT'S FAILURE TO INSTRUCT SUA SPONTE ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY REQUIRES REVERSAL

In his opening brief, appellant argued that the jury should have been instructed on theft as a lesser included offense of robbery. (AOB 206-210.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB 162.) Accordingly, no reply is necessary.

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XIII

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

In his opening brief, appellant argued that the delivery of CALJIC No. 2.51 improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. (AOB 211-217.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB 163-167.) Accordingly, no reply is necessary.

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XIV

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

In his opening brief, appellant argued that the delivery of certain standard CALJIC instructions enabled the jury to convict appellant on a lesser standard than is constitutionally required. (AOB 218-235.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB 168-179.) Accordingly, no reply is necessary.

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PENALTY PHASE CLAIMS

XV

THE ADMISSION OF IMPROPER AND INFLAMMATORY VICTIM IMPACT EVIDENCE RENDERED THE PENALTY PHASE OF APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR AND REQUIRES REVERSAL OF THE DEATH PENALTY

Trial counsel objected to admission at the penalty phase of a 22-minute videotape, composed of dozens of still photographs and video clips documenting Sara Weir's life from infancy to her grave, prepared and narrated by her mother. Counsel's objection – "It's a beautiful tribute to Sara. There is no question about that . . . I don't think this qualifies, Your Honor, as victim impact" (RT 2427) – was well taken, as demonstrated by this Court's recent decision in *People v. Robinson* (2005) ___ Cal.4th ___ [2005 WL 3434124]. In *Robinson*, this Court cited as "one extreme example of . . . a due process infirmity," the case of *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330. (*Id*. at p. *4.) As discussed in the opening brief, the videotape in this case is nearly identical to that in *Salazar*, even in the music that accompanied both tapes. (AOB 247.)[24]

The extended tribute provided by the videotape, which followed lengthy testimony by Weir's mother, Martha Farwell, at both the guilt and penalty phases of trial, went far beyond the standards set by this Court and by the United States Supreme Court. Justice Moreno, in his concurring opinion in *Robinson* found some of the testimony by family members

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[24] Respondent attempts to distinguish *Salazar* because it is an "out-of-state case," and "not controlling," but then cites an Arkansas case in which that state's Supreme Court upheld admission of a video tape as permissible victim impact evidence. (RB 194.)

"crossed the line between proper victim testimony and improper characterization and opinion by the victim's family." (*Id*. at p. ___ [2005 WL 3434124, at p. *44, conc. opn. of Moreno, J.) The testimony in *Robinson* cited by Justice Moreno – that of the parents of the victims imagining the last moments of their children's lives – is nearly identical to Martha Farwell's description of her dreams about how her daughter died. (RT 2449-2450.) Ms. Farwell testified, "I could imagine what happened, what she went through. I could imagine the horrible panic and fear." (RT 2451.)

Whatever relevance such evidence had was outweighed by its overwhelmingly prejudicial effect. Respondent contends any error in admitting the victim impact evidence was harmless because it was limited and not inflammatory. (RB 198-199.) In addition, respondent argues that in light of the "devastating" aggravation evidence, the videotape "pale[d]" by comparison. (RB 200.) Respondent fails, however, to explain how, in spite of the admission of such extensive and emotionally overwhelming evidence by the prosecution, and the presentation of *no* mitigation by the defense, the jury deliberated over the course of three days before reaching a death verdict.

Respondent's argument in support of the admission of the extensive victim impact evidence at the penalty phase of appellant's trial rests on an erroneous understanding of the limitations on the admission of such evidence. Respondent's position on the parameters of victim impact evidence is clearly stated: "Where a defendant causes a great harm or loss, there is no rational reason for limiting evidence that demonstrates that harm." (RB 195.) That position ignores the restraints placed upon the admission of victim impact evidence by the dictates of due process. In

People v. Edwards (1991) 54 Cal.3d 787, this Court cautioned: "we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne* . . . ." (*Id*. at pp. 835-836.) The Court further warned that:

> Our holding also *does not mean there are no limits on emotional evidence and argument*. In *People v. Haskett*, *supra*, 30 Cal.3d [841] at page 864, we cautioned, "Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the probative and the prejudicial. [Citation.]"

(*Id*. at p. 836, fn. 11, emphasis added.)

Respondent claims that in the penalty phase of a capital trial, "a trial court's discretion to exclude evidence as unduly prejudicial is *narrower* than in the guilt phase." (RB 190.) In support of this contention, respondent cites to, but does not quote from, this Court's opinion in *People v. Anderson* (2001) 25 Cal.4th 543, 591-592. In the portion of the case cited by respondent, this Court addressed defendant's objection to the introduction of photographs of the crime scene at the penalty phase and observed: "a court has narrower discretion under Evidence Code section 352 to exclude *photographic evidence of the capital crimes*[25] from the penalty trial than from the guilt trial." (*Ibid*., emphasis added.) Respondent offers no authority for the much broader contention that a trial court's discretion regarding the exclusion of victim impact evidence is narrower than the court's discretion to exclude evidence at the guilt phase of trial.[26]

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[25] Respondent's reference to *Anderson* omits the italicized language.

[26] Because victim impact evidence is not admissible at the guilt phase of trial, respondent must be referring to the court's discretion to admit

Appellant's fundamental claim is that the trial court abused its discretion because it failed both to understand the role of victim impact evidence and to utilize its discretion in a manner that comports with the constitutional principles underlying that role. That is why, contrary to respondent's contention (RB 184), none of these claims has been waived. The objection on appeal is the same basic objection as that made in the trial court: the trial court violated the principles governing the admission of victim impact evidence by admitting the challenged victim impact evidence, resulting in a fundamentally unfair penalty phase.

As this Court recently held in *People v. Partida* (2005) ___ Cal.4th ___ [35 Cal.Rptr.3d 644]:

> When a trial court rules on an objection to evidence, it decides only whether that particular evidence should be excluded. Potential consequences of error in making this ruling play no part in this decision. A reviewing court, not the trial court, decides what legal effect an erroneous ruling had. Here, the trial court was called on to decide whether the evidence was more prejudicial than probative. It did so. Whether its ruling was erroneous is for the reviewing court to decide.

(*Id*. at p. ___ [35 Cal.Rptr.3d at p. 649].)

In addition, any more specific objection would have been futile. In the course of the in limine discussion regarding the admissibility of victim impact evidence, the prosecutor argued that the evidence that the jury heard at the guilt phase – referring to the testimony of the three uncharged rape victims – was so aggravating, especially in relation to the lack of any mitigating evidence, that admission of the videotape would not be prejudicial. (RT 2430.) In its ruling admitting the video tape prepared by

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other kinds of evidence at the guilt phase.

Ms. Farwell, the court agreed with the prosecutor's assessment: "I think what Mr. Ipsen said, what this jury has heard from many other people makes this tape pale." (RT 2431.) The trial court also held that the videotape was admissible because Ms. Farwell could have testified to its contents. Clearly, the court saw no reason to limit or edit – let alone exclude – the victim impact evidence. This ruling demonstrates that, given an opportunity to limit the presentation of victim impact evidence, the court refused to do so.

Respondent simply cannot show that admission of the victim impact evidence did not impermissibly tip the balance against appellant. Reversal of the death sentence is required.

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XVI

THE TRIAL COURT ERRED BY REFUSING SEVERAL REQUESTED DEFENSE JURY INSTRUCTIONS

In his opening brief, appellant argued that the trial court should properly have delivered several requested instructions at the penalty phase of trial. (AOB 260-270.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB 201-207.) Accordingly, no reply is necessary.

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XVII-XX

CALIFORNIA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

Appellant's Opening Brief sets forth numerous bases on which California's death penalty statute violates the federal constitution, while acknowledging that this Court has already rejected these claims of error. (AOB 270-362.) Respondent simply relies on this Court's prior decisions without adding new arguments. (RB 208-220.) Accordingly, the issues are joined and no reply is necessary.

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XXI

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

In his opening brief, appellant argued California's sentencing procedures violate international law and fundamental precepts of international human rights. Appellant requested that this Court reconsider its decisions rejecting similar claims (see e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511). (AOB 363-369.) Respondent answers this claim by relying on this Court's previous decisions without substantial further analysis. (RB 221.) Accordingly, no reply is necessary.

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XXII

IF EITHER SPECIAL CIRCUMSTANCE FINDING IS REVERSED, THE DEATH JUDGMENT MUST ALSO BE REVERSED

In the opening brief, appellant asserted that if this Court reverses either of the special circumstance findings, the death judgment must likewise be reversed. As noted by respondent, the issue of whether California is a "weighing" state for purposes of assessing the impact of an invalid special circumstance on the sentence selection process in the penalty phase is presently pending before the United States Supreme Court in *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1058-1068, cert. granted in part Mar. 28, 2005, sub nom. *Brown v. Sanders* (2005) ___ U.S. ___ [125 S.Ct. 1700, 161 L.Ed.2d 523]. (RB 222-223.)

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XXIII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Contrary to respondent's assertion (RB 224), defendant was afforded neither a perfect trial nor a fair one. The cumulative effect of the many errors committed at both phases of appellant's trial require reversal, even if each error individually does not.

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CONCLUSION

For all of the reasons stated above and in appellant's opening brief, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: December 28, 2005

Respectfully submitted,

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State Public Defender

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Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Evan Young, am the Senior Deputy State Public Defender assigned to represent appellant, Douglas Kelly, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 19,358 words in length excluding the tables and certificates.

Dated: December 28, 2005

_____
Evan Young